

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ESTEBAN HERNANDEZ,

Petitioner,

\* \* \* Case No. 2:17-cv-01570-JCM-EJY

ORDER

v.

JO GENTRY, et al.,

Respondents.

In November 2017, this court dismissed Esteban Hernandez's pro se 28 U.S.C. § 2254 habeas corpus petition as second and successive, and judgment was entered (ECF Nos. 6, 8). He took no further action until more than four years later, when he filed a counseled motion for certificate of appealability (ECF No. 9).

The motion suffers from at least two defects. First, counsel for Hernandez has not filed a notice of appearance in this action. Second, this action was at least the third that this court dismissed as successive (see ECF No. 6, pp. 1-2). 28 U.S.C. § 2244(b)(3)(A) provides: “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Where a petition has been dismissed with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d

1 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir.  
2 2005).

3 Hernandez alleges that he has newly discovered unsealed state district court  
4 minutes that demonstrate that his guilty plea was not voluntary (ECF No. 9). He asks for  
5 a certificate of appealability, but that is moot at this point. Any appeal of the dismissal of  
6 this petition would be untimely. He also acknowledges that he needs authorization to file  
7 a new petition. But Hernandez needs to seek such authorization from the Ninth Circuit  
8 Court of Appeals. 28 U.S.C. § 2244(b)(3).

9 **IT IS THEREFORE ORDERED** that petitioner's motion for a certificate of  
10 appealability (ECF No. 9) is **DENIED** as set forth in this order.

11 **IT IS FURTHER ORDERED** that the motion for leave to file under seal (ECF No.  
12 11) is **DENIED**.

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14 DATED: April 8, 2022  
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17 JAMES C. MAHAN  
18 UNITED STATES DISTRICT JUDGE  
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